Supreme Court, U.S.
FILED

JUN 12 2008

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No. 08-11

IN THE
SUPREME COURT OF THE UNITED STATES

GABRIEL G. ATAMIAN, MD, MSEE, JD,

Petitioner,

v.

WILLIAM M. RICH, MD,

Respondent.

On Petition for a Writ of Certiorari to
Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

GABRIEL G. ATAMIAN, MD, MSEE, JD
1021 N. State Street
Apt. A
Dover, DE 19901
302-678-2546

Petitioner Pro Se

QUESTIONS PRESENTED

1. Whether the lower court has jurisdiction to act as an inquitor and dictate the decedent's successor in interest that cannot proceed as a pro se litigant?
2. Whether the amendment of adding the successor in interest's name to the decedent's lawsuit caption should have been given freely without leave from the court, because the defendant has never filed an answer?
3. Whether the decedent's brother, under the definition of California Probate Code, Section 39, he can represent the health matters of the decedent?

LIST OF PARTIES

Petitioner is a 72-year-old American Born Again Christian.

Petitioner is a physician, electrical engineer and a lawyer.

Petitioner is a physician with three specialties:

a. Board Certified in Physical Medicine and Rehabilitation.
b. Psychiatry with a Diploma with Honors.
c. Three years of educational training in cardiology at the American College of Cardiology.

In addition, Petitioner has the following:

BA	in mathematics	1960
BS	in computer sciences	1986
MA	in chemistry	1961
MD	doctor in medicine	1965
MSEE	master in electrical engineering	1989
MS	in applied physics	1990
JD	juris doctor	1993

Respondent William M. Rich, MD is a gynecologist practicing in Fresno, California.

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American College of Physicians. Ethics Manual. 1st Edition, Philadelphia: American College of Physicians, 1984, page 13. 26

BEST AVAILABLE COPY

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The order and judgment of the Superior Court of Fresno (J. Alan Simpson) dismissing the case, is actually drafted by the defendant's counsel, Mr. Casheros; where the judge has not even signed his name but has printed his name, are reprinted at Appendix B and are not otherwise published.

The 5th Appellate decision (per, Gomes, J., joined by Dawson and Kena, JJ) dismissing the appeal, are reprinted at Appendix A and are not otherwise published.

The Supreme Court of California denying the petition of review, is reprinted at Appendix F.

JURISDICTION

The Supreme Court of California denied the petition of review on April 23, 2008. There is no petition of rehearing in the Supreme Court of California. The jurisdiction of this court is invoked under 28 USC § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right to file a lawsuit pro se is one of the most important right under the United States Constitution and laws. (*Elmore v. McCammon*, (1986) 640 F. Supp 905).

A next friend is a person who represents someone who is unable to tend his or her own interest. (Federal Rules of Civil Procedure, Rule 17, 28 USC "next friend").

STATEMENT OF THE CASE

May 2, 2006: The court did not hear the amended complaint to add indispensable parties of the deceased.

Summary of the hearing of May 2, 2006: George Beberian was present on that hearing. George is the son of the deceased; but, George Beberian is not a party of the action.

George Beberian became nervous at the coercion and intimidation of Judge Simpson, stating that the case will be dismissed if is not represented by an attorney.

Throughout the entire hearing of May 2, 2006: Judge Alan Simpson made comments about the dismissal of the case if it is not represented by the attorney. Needless to say, the judge in our American Jurisprudence is a referee rather than an inquisitor. Also, it should be pointed out to the Court that the hearing was about the acceptance of an amended complaint rather than dismissal right for the petitioners pursuant to CCP 472 and 473.30.

Excerpts of the hearing on May 2, 2006, indicates:

> THE COURT: the second thing is that I haven't looked at this Motion to Amend Complaint. I know there was some discussion about changing. . . .
>
> Mr. Casheros: let's give them some time, if they can, to find a lawyer. And if they to re-file this case, then, they can, and that seems to me a common sense approach that the court can exercise.
>
> You have the inherent authority to dismiss a case without prejudice, as long as it doesn't harm them, and we can go from there. . . ."

> THE COURT: . . . I didn't say it exactly this way, but essentially what I said is that I can't hear a motion to amend the Complain today."

On June 29, 2006, Judge Alan Simpson, demonstrated the same behavior and conduct as of May 2, 2006; and denied the amended complaint to add two indispensable parties in accordance to CCP 472 and 473.30.

From the above facts, it is clear that the petitioners have the right to amend his petition before the defendant has filed his answer therefore, it is obvious that, the plaintiffs have the right to amend complaint, it is the corrective duty, of the respondent judge to accept the amended complaint, and said respondent, in refusing the permit the amendment of plaintiffs" complaints, unlawfully neglected to perform on which the law specifically enjoins as a duty resulting from his office, or excluded the plaintiffs' from the enjoyment of a right to which their entitled, and there is no other plain speedy and adequate remedy in the ordinary course of law.

Third Attempt to Amend Complaint

Excerpts from the June 29, 2006, hearing, in pertinent parts, states:

> THE COURT: This is the third time now, I believe, that I have tried to explain to the people who have come here for your side of the case that we can't do this what they're asking.
>
> THE COURT: There's no reason to have this on calendar for what he's trying to do today in an ex parte situation. . . proceeding. There's just no reason."

Again, Judge Simpson as in the hearing of May 2, 2006 and this hearing of June 29, 2006, Judge Simpson is refusing to hear the case unless it is represented by an attorney. Also, as acted toward George Beberian on May 2, 2006 [1]. Judge Simpson has demonstrated the same attitude toward plaintiff Gabriel G. Atamian, on the hearing of June 29, 2006.[2]

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[1] Hearing of May 2, 2006:

MR. BEBERIAN: Well, . . .

THE COURT: Having said that, . . .

MR. BEBERIAN: Can I do this then?

THE COURT: No, you can't.

MR. BEBERIAN: Can we just. . . .

THE COURT: When I talk. . . .

MR. BEBERIAN: Oh, I am sorry.

THE COURT: . . . you don't talk.

MR. BEBERIAN: Oh, I am sorry. I'm sorry, your Honor.

THE COURT: You. . ., you. . . you want to watch what you say.

(Continued on following page)

On July 7, 2006, petitioners' filed a Petition for Writ of Mandate and Prohibition to the 5th Appellate Court.

On July 24, 2006, defendant filed the opposition.

On August 3, 2006, the 5th Appellate Court summarily denied the Writ of Mandate and Prohibition.[3]

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[2] Hearing of June 29, 2006:

MR. ATAMIAN: Then . .

THE COURT: Stop. Don't interrupt. . .

MR. ATAMIAN: Let me. . .

THE COURT: Don't interrupt.

MR. ATAMIAN: I will tell you something.

THE COURT: No, you're not. I'm going to deny this in a minute.

MR. ATAMIAN: Then, I will go to the appellate court. . .

THE COURT: Well, I will save you some time, and you can head there now. Thank you

MR. ATAMIAN: Thank you.

[3] Plaintiff Gabriel G. Atamian, lives in Dover, Delaware; where the law library does not have California Pleading Forms. On August 24, 2006 Plaintiff was in the Superior Court of Fresno's library; where, plaintiff for the first time find out that the amended complaint should have been attached by the following two documents:

(a) The death certificate of the deceased.

(b) The deceased's estate was administered.

(Continued on the next page)

The order of the Fifth Appellate District, states:

> ". . .Petitioners have failed to show the inadequacy of their legal remedy of taking the steps necessary to file a properly amended complaint in the above referenced superior court action."

Unfortunately, the Court did not want to discuss the aberrant and the non-judicial acts of Judge Simpson.

Moreover, plaintiff did seek review of the denial of the Writ from the Supreme Court of California. But, the Supreme Court denied the motion to extend time before reviewing the Writ.

It is very essential to notice that Justice Kane who was one of the three Justice's who decided the Writ, was an attorney with the firm of Mr. Casheros. Mr. Kane in 1976, had joined McCormick & Barstow law firm, where he practiced as an associate (1976-1981) and then as a partner (1981-92).

The above deficiencies which are procedural should have been pointed by the lower court to the plaintiff on June 29, 2006, hearing; especially, where the plaintiff is a pro se litigant.

A judge who makes no effort to prevent a self-represented litigant from making procedural and technical errors that jeopardize the litigant's claim may deny that litigant "meaningful" access to the court.

July 25, 2006 Cast Status Conference

It should be noted that 2 weeks notice from July 11 to July 25, 2006, is not sufficient time. Plaintiff, also, believes that the Civil Court Rules of California requires more than 2 weeks notice.

Moreover, plaintiff filed a motion of stay with the Fifth Appellate Court on July 7, 2006.

On August 8, 2006, Judge Simpson dismissed the case.

On September 6, 2006, Philip Beberian the administrator of the decedent filed Declaration in Support of motion for order substituting successor in interest for deceased plaintiff, Margaret Beberian.

On September 6, 2006, Objection to the Order of Dismissal, with prejudice, and entry of judgment in favor of defendant, William Rich, M.D.

But, unfortunately Judge Simpson did not respond when the deficiencies were corrected in violation of CCP Section 377.30 and 377.31.

On September 11, 2006, plaintiff filed an appeal to the Fifth Appellate Court of the California.

On January 7, 2007, plaintiff, also filed a complaint against Judge Simpson and defendants Dr. Rich and Mr. Casheros to the United States

District Court of Eastern Division of California, in violation of 42 USC section 1985(3) and 92) and 74 USC section 1983.

On February 28, 2008, the Fifth Appellate Court of California dismissed the Appeal.

On March 3, 2008, plaintiff filed Petition for Review to the Supreme Court of California. The petition was denied on April 23, 2008.

♦

REASONS FOR GRANTING THE WRIT

A. The amendment of adding the successor in interest's name to the caption should have been given freely without leave from the court, because the defendant has never filed an answer.

In *Klopstock v. Superior Court*, the appellate court determined that the real party in interest was the executor of the deceased. Thereafter, an amended complaint was offered, naming the decedent's executor as plaintiff.

In *Allen v. Hindin*, statute governing amendment of pleadings authorizes amendment without leave to amend only before adverse party has filed answer. Code Civil Procedure § 472.

B. **Petitioner is going to cite authorities and the points in the right to file lawsuit as a pro se litigant.**

> In *Elmore v. McCammon*, states: ". . .the right to file a lawsuit is one the most important rights under the constitution and laws."
>
> In *Jenkins v. McKeithen*, the Supreme Court of the United States, states: "pro se pleading are to be considered without regard to technicality; pro se litigants' pleadings are not to be held to the same standards of perfection as lawyers."
>
> In *Schware v. Board of Examiners*, states: "The practice of law cannot be licensed by any state/State."

C. **The lower court did not specify in writing or orally the procedural deficiencies of the amended complaint to add the successor in interest's name to the caption; in order, the successor would have been able to eradicate the procedural deficiencies; and, thus to be able to continuation of the case. (See FN 3, supra).**

D. **Postjudgment filings, by the successor in interest, was done by furnishing the declaration of Philip Beberian, along with two exhibits – a**

copy of Margaret Beberian's death certificate and a copy of pages one and six of her last will and testament.

The Court of Appeal should have held that the postjudgment filings of the successor in interest, as an "Ancillary and collateral matters"; thus, remanding the case for a further proceedings.

E. Until today, the defendant has never responded to decedent's original complaint; and, to the Affidavit of Gabrial G. Atamian, MD, MSEE, JD.

The original complaint was a fact pleading defining and illustrating the health matters of the decedent. Defendant by not responding to the pleading has violated the rules of pleading.

F. From the definition of California Probate Code, section 39, petitioner as a "fiduciary", qualifies to represent decedent's health matters, before and after the death of decedent, under the code's statement: "Or other legal representation subject to this code".

ARGUMENT

A. The Court of Appeal's Order of Dismissal in this case raises an important question of law that was wrongly decided.

1. The Court of Appeals incorrectly abstained from addressing on postjudment filings,

   a. The Declaration of Philip Beberian, the successor in interest, it does not affect the judgment or order.

The perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby including enforcement of the judgment or order, but the trial court may proceed upon any matter embraced in the action and not affected by the judgment or order.[4]

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[4] Section 916, subdivision (a) states in full: "Except as provided in Sections 917.1 to 917.9, inclusive, and in section 116.880, the perfecting an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."

To accomplish this purpose, section 976, subdivision (a) stays all further trial court proceedings "upon the matters embraced" in or "affected" by the appeal. In determining whether a proceeding is embraced in or affected by the appeal, one must consider the appeal and its possible outcomes in relation to the proceeding and its possible results. "Whether a matter is 'embraced' in or 'affected' by the judgment within the meaning of [section 916] depends on whether postjudgment proceedings on the matter would have any effect on the 'effectiveness' of the appeal. (In re Marriage of Horowitz, (1984) 159 Cal. App. 3d 377, 381).

In the present case, Philip Beberian the successor in the interest filed pursuant to CCP 377.32, a Declaration in Support of motion for order substituting successor in interest for decedent plaintiff, Margaret Beberian, on September 6, 2006.

But the trial court, Judge Simpson, did not act on the Declaration of Philip Beberian, along with its two exhibits – a copy of Margaret Beberian death certificate and a copy of pages one and six of her last will and testament.

In summary, Judge Simpson did not act on postjudgment filings of the Declaration of Philip Beberian which have cured the deficiencies asked by the court. The postjudgment filings of Philip Beberian Declaration would have any effect on the 'effectiveness' of the appeal.

b. By contrast, an Appeal does not stay proceedings on "Ancillary and Collateral matters which do not affect the judgment on appeal" even though the proceedings may render the appeal moot.

The Legislature has established that certain proceedings, by law, are collateral to the merits of an appeal despite their potential effect on the appeal. Thus, the Declaration of Philip Beberian, it has nothing whatsoever to do with present appeal, where Philip Beberian was not a party to the appeal. Therefore, the Declaration qualifies to be ancillary and collateral matters which do not affect the judgment on appeal, even though the granting of postjudgment proceedings may render the appeal moot.[5]

c. The Court of Appeal erred for not remanding the case for further consideration on the postjudgment filings.

---

[5] The Declaration provided the following two documents:

(a) The death certificate of the deceased;

(b) The deceased's estate was administered.

The above documents have qualified the deficiencies asked by the court; and, the amended complaint would not have been denied.

The opinion of The Court of Appeal, dated February 8, 2008, see A-6, p. 5, states:

> "Furthermore, the postjudgment filings have not been ignored. This court has considered (1) the declaration of Philip Beberian, along with its two exhibits – a copy of Margaret Beberian's death certificate and a copy of pages one and six of her last will and testament and (2) Atamian's objection to the order of dismissal."

The Court of Appeal erred for not remanding the case for further proceedings to the superior court, due to the fact that consideration of the lower court for Philip Beberian's Declaration would have eradicated the deficiencies asked by the lower court, to grant the amended complaint, and, thus the continuance of the case.[6]

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[6] In Klopstock v. Superior Court (1941) 108 P.2d 906, the appellate court determined that the real party in interest was the executor of the deceased. Thereafter, an amended complaint was offered, naming the decedent's executor as plaintiff.

A timely amendment as the course may add new parties, without the approval of the court. See, National Secretarial Service v. Froelich, 210 Cal. App. 3rd 510. This rule expressly applies to amendments made to pleadings before the filing of responsive papers.

(Continued on the next page)

The amendment of adding the executor's name to the caption should have been given freely without leave to amend from the court, in the present case, because the adverse party has never filed answer. Allen, Id.

2. The Court of Appeals should have determined that the defendant was liable because of the following:

   a. The defendant, Dr. Rich, has not responded to the original complaint and the affidavit of Gabriel G. Atamian, MD, MSEE, JD.

Until today the defendant, William M. Rich, MD has managed not to answer the original complaint, where the entire complaint is composed of 90% of medical statements.

Moreover, Dr. Rich has not answered the Affidavit of Gabriel G. Atamian, MD, MSEE, JD, which was filed for the June 29, 2006 hearing day. The Affidavit of Gabriel G. Atamian is reproduced in Appellant's Appendix, see (App. 31), Affidavit of Gabriel G. Atamian, BA, BS, MA, MD, MSEE,, MS, JD.

Statute governing amendment of pleadings authorizes amendment without leave to amend only before adverse party has filed answer. Code Civil Procedure § 472.

If and when the Respondent answers the original complaint and the affidavit of Gabriel G. Atamian, MD, MSEE, JD, it will become evident and clear that Dr. Rich has committed the following deviation from the standard of care in medicine and surgery. The following wrongs committed, meaning malpractice, are:

1) A portion of the uterus has been left in the vagina, during the hysterectomy. Where, because of Tamoxifen therapy, that portion has become cancerous.
2) Delayed diagnosis of vaginal cancer, because bilateral inguinal spread reveals that this type of cancer is not timely detected.
3) In negligently failing to conduct an adequate physical examinations or more office visits, in order to detect the uterine cancer. It is very peculiar that a mass of 2-2.5 cm appear in the vaginal introitus.
4) In negligently failing to keep personally abreast of current scientific diagnostic tests and the immunohistochemistry and its significance. It was the duty of defendant to follow the Decedent with the utmost of the diligence, which would have permitted to detect the uterine adenocarcinoma of the vagina timely.

Moreover, after having reviewed the Affidavit of Gabriel G. Atamian, see Appendix G, (App. 31), it

will become clear that a great miscarriage of justice has been done to the decedent, Margaret Beberian, and her entire family including her brother who is one of the best educated physician in America.

b. The Court Appeal states that the defendant has not removed the entire uterus, a portion of the Decedent's uterus that was not removed during surgery.

The Court of Appeal's opinion, facts and proceedings, on p. 2, (A-3) states:

> "Defendant performed a total abdominal hysterectomy on Margaret Beberian in January 2002. About two and a half years later, in November 2004, defendant discovered that Margaret Beberian had cancer on a portion of her uterus that was not removed during the surgery."

Where, even a lay person can grasp that defendant, Dr. Rich, has left a portion of the uterus on January 17, 2002, during the total hysterectomy. If, the entire uterus (total uterus) was taken out on January 17, 2002, by defendant, it would have been impossible for Margaret Beberian to have a uterine adenocarcinoma, which was detected on November 11, 2004, thus causing the death of Margaret Beberian on January 16, 2006.

c. The Court of Appeal erred for not remanding the case to the lower court for further proceedings.

It is clear from the above section (a) and (b), that the defendant, Dr. Rich, is admitting his liability in this present malpractice suit. Even, the Court of Appeal's section (b) indicates the admission of the defendant about being liable.

The Court of Appeals erred for not remanding the case for further proceedings, for the superior court to determine the damages caused by the negligence of the defendant for not removing the total uterus. The Court of Appeal should have remanded this case to the lower court, for the determination of the damages only, by the trial court or by the arbitration or the mediation.

3. The Court of Appeals did not take into notice and consideration of the bizarre and aberrant behavior of the superior court's Judge Alan Simpson.

a. Judge Simpson bizarre and aberrant behavior before the session of the court.

The aberrant and bizarre behavior of Judge Simpson of the Fresno Superior Court is being adjudicated by the Federal Courts. See, p. 6, Supra.

Furthermore, Petitioner has during oral argument of the Court of Appeal, on January 16, 2008, stated the following to the three justices:

Judge Simpson acted outside of his judicial capacity and he is not entitled to immunity for his bizarre and aberrant behavior, in front of plaintiff, before the session of the court on June 29, 2006. Before the session of the court, Judge Simpson introduced himself and shook Petitioner's hand. And, then, in front of the petitioner he began to perform body languages portraying the sign of "waking up from the sleep".

Petitioner declares that in his entire life and also in his contact with the judges, Petitioner Gabrial G. Atamian, he has never witnessed such an aberrant and bizarre behavior as demonstrated by Judge Alan Simpson before the session of the court.

b. Judge Alan Simpson has no jurisdiction to act as an inquisitor and dictating the Decedent's executor, Philip Beberian how to proceed, by not allowing him to proceed as a pro se litigant.

Plaintiff is going to cite authorities and points in the right to file lawsuit as a pro se litigant.

In *Elmore v. McCammon* (1986), 640 F. Supp. 905, states:

> ". . . the right to file a lawsuit pro se it one of the most important rights under the constitution and laws."

In *Jenkins v. McKeithen*, 395 US 411, 421 (1959); *Picking v. Pennsylvania R. Co.*, 151 Fed 2d 240; *Pucket v. Cox*, 456 F. 2d 233, states:

> "Pro se pleadings are to be considered without regard to technicality; pro se litigants' pleadings are not to be held to the same high standards of perfection as lawyers."

Maty v. Grasselli Chemical Co., 303 US 197 (1938), states:

> "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment."

Puckett v. Cox, 456 F. 2d 233 (1972) (6th Cir. USCA), states:

> "It was held that a pro se complaint requires a less stringent reading than

> one drafted by a lawyer per *Justice Black in Conley v. Gibson.*"

Picking v. Pennsylvania Railway, 151 F. 2d 240, Third Circuit Court of Appeals, states:

> ". . .it was held "where plaintiff pleads pro se in a suit for protection of civil rights, the Court should endeavor to construe Plaintiff's Pleadings without regard to technicalities."

Schware v. Board of Examiners, United States Reports 353 US pages 238, 239, states:

> "The practice of law cannot be licensed by a state/State."

Sims v. Aherns, 271 SW 720 (1925), states:

> "The practice of law is an occupation of common right."

c. Ex parte communication by Judge Alan Simpson with the defendant's counsel, on the hearing day of July 11, 2006 where petitioner was not present, reveals the following:

(i) That Judge Simpson has made Petitioner crazy, meaning an unstable person;

(ii) That Judge Simpson through his deputy, had intended to intimidate Petitioner.

Excerpts of the transcript of the hearing of July 11, 2006, does indicate the above statement of subsection (i) and (ii), where it states:

> "The other deputy came into the courtroom and through the back. . well, the front door of the courtroom and sat down in the – in the spectator section and waited for the hearing to be over and then indicated in a nice way, I understand, that he would walk Mr. Beberian (Sic) out.
>
> And I guess Mr. Beberian (Sic) was asking, "Well, do you do this for everybody?" or something like that.
>
> I mean, it was innocuous kind of thing, as I understood, from my leaving the courtroom.
>
> But he was upset, . . .I'll say that. . very upset and somewhat unstable, it looked like.
>
> "Atamian," I've been saying "Beberian." It's "Atamian." So

> everywhere I've said "Beberian," I meant "Atamian.""

From the above foregoings, it is clear that Judge Simpson through his deputies have intended to intimidate plaintiff for not to attend the court room of the Superior Court of Fresno, in the future.

But Judge Simpson states on the hearing day of July 11, 2006:

> "It's not probably reflected clearly in the record because one had to see his physical demeanor. . ."

It may be noticed by this Court that any movement, any iteration, any bizarre behavior, any upset, any instability, any inappropriate physical demeanor, any agitation of the litigants are recorded by the court reporter.

Further, Judge Simpson labeling Petitioner unstable, is a record which is accessible by the public, is the biggest injustice done by a Judge, in our beautiful land of the United States of America.

In order to label a person unstable meaning crazy in the layperson's understanding, one should know the person's cognitive processes and affective processes rather than the behavior.

In psychiatry, the diagnosis of craziness is made through the thinking and emotional processes of the person. Never, in psychiatry, a diagnosis of craziness is made through the physical demeanor.

Therefore, it is when Judge Simpson was not acting as a judicial capacity it does definitely belong to the domain of non-judicial act.

Furthermore, Judge describing the above events to Mr. Casheros on the hearing of July 11, without Petitioner being present, it is an Ex Parte communication with the adverse party's counselor, it does render also the act to be a non-judicial act in the part of the judge.

Non-judicial acts done by the judges are not protected by the absolute immunity of the judge.

4. The Court of Appeal incorrectly held that Atamian has failed to demonstrate that he is "personal representative": entitled to pursue the malpractice lawsuit.

    a. The Relationship between the Decedent and her brother, Gabriel G. Atamian, a physician, has been generally characterized as a "Fiduciary".

Citing from Manuscript; The Patient Self-Determination Act: Meeting the Challenges in Patient Care, 1998, by Lawrence P. Ulrich, states:

The relationship between patient's and their physicians has been generally characterized as a fiduciary one. This means that its primary characteristic is one of virtuous practice grounded in fidelity and motivated by beneficence.[7] The nature of this relationship is traceable to the origins of the Hippocratic tradition.[8]

In a fiduciary relationship the "fiduciary," in this case the physician, assumes an obligation to act on the patient's behalf and in the patient's interest. On this understanding the physician takes on the role of the patient advocate.[9] The physician as advocate functions very much like the lawyer as advocate.

From the above foregoings, it is clear that the decedent's relationship with her brother, Gabrial G. Atamian, MD, MSEE, JD, who is a physician with multiple specialties, should be characterized as a "Fiduciary".

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[7] Pellegrino ED, Thomas, MA, DC. For the patient's good: the restoration of beneficence in health care. New York: Oxford University Press, 1988, page 116.

[8] Lloyd GER (ed), Hippocratic Writings, London: Penguin Books, 1983, page 9.

[9] American College of Physicians. Ethics Manual, 1st Edition. Philadelphia: American College of Physicians, 1984, pages 13.

b. Gabirel G. Atamian, MD, MSEE, JD, Petitioner, as a 'fiduciary", he has represented the Decedent malpractice lawsuit against the defendant, while the Decedent was alive. Also, Petitioner, Gabriel G. Atamian, he has drafted the original complaint.

Decedent's brother, Gabriel G. Atamina, BA, BS, MA, MD, MSEE, JD is one of the best educated physicians in the United States of America who through the collaboration of the Decedent (Margaret Beberian), when she was alive and also through Decedent's medical records, medical history, diagnoses, medications, and treatment; petitioner, he has been able to enumerate the essential medical facts and issues, and, thus he has been able to draft the original complaint which was filed by the Decedent on November 10, 2005.

By studying the complaint, even a lay person can grasp and understand that defendant, Dr. Rich, has left a portion of the uterus, during the total hysterectomy surgery on January 17, 2002, by the defendant, it would have been impossible for Decedent, Margaret Beberian, to have a uterine adenocarcinoma as detected on November 11, 2004. Thus, causing the death of Margaret Beberian on January 16, 2006.

b. Gabriel G. Atamian, MD, MSEE, JD, as "Fiduciary" he has represented

> Decedent's malpractice lawsuit against defendant, before and after Decedent's death. Petitioner does represent Decedent's health care matters only and he does not represent the estate and the property.

It is clear from the above sections that Petitioner as "Fiduciary" of the Decedent's health matters and medical reports only.

Because the cause of action is malpractice and not the Estate and the property of the Decedent; Petitioner does indeed qualifies as "Fiduciary" to represent decedent's malpractice lawsuit before and after Decedent's death on January 16, 2006.

California Probate Code Section 39 states: "Fiduciary" means personal representative, trustee, guardian, conservator, attorney-in-fact, under a power of attorney, custodian under the California Uniform Transfer to Minors Act (Part 9 (commencing with Section 3900) of Division 4), or other legal representative subject to this code.

From the above definition of California Probate Code section 39, it is clear that Petitioner as "fiduciary" for the health issues of the Decedent; Petitioner qualifies under "or other legal representative subject to this code", to represent health issues in the malpractice lawsuit against the defendant.

From the above reasons, it is evident that the Court of Appeal erred for not letting the Petitioner who is a physician and he knows the Decedent' s medical condition and problems; and, who drafted the Complaint, to be represented in Decedent's malpractice lawsuit.

In summary, Petitioner, Gabriel G. Atamian, MD, MSEE, JD, has demonstrated that he is a "Fiduciary" under the California Probate Code section 39, to represent the Decedent's malpractice lawsuit against the defendant under sections 377.31 and 377.60.

CONCLUSION

Petitioner respectfully requests that the Court GRANT the petition. Or, in the alternative, the Petitioner does request that the Court GRANT a summarily Disposition on the merits and transfer to the court of appeal for reconsideration, where the defendant admits his liability for not removing the total uterus.[10]

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[10] See, supra, p. 13, where the excerpt of the Court of Appeals opinion, states:

". . . cancer on a portion of her uterus that was not removed during the surgery."

(Continued on next page)

And, for such other relief as the Court may deem appropriate.

Respectfully submitted,

Gabriel G. Atamian, MD

Gabriel G. Atamian, MD, MSEE, JD MSEE, JD

Dated: June 26, 2008

Pathology report for the total hysterectomy, on January 17, 2002, did not reveal any cancer of the uterus. Margaret Beberian developed cancer of the portion left and not removed because she was on Tamoxifen since 2000. Tamoxifen side effect which is very well known, is to induce uterine cancer.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

MARGARET BEBERIAN, Plaintiff. V. WILLIAM M. RICH, Defendant and Respondent; GABRIEL G. ATAMIAN Movement and Appellant.	FO51240 (Super. Ct. No. 05CECG03527) **OPINION**

APPEAL from a judgment of the Superior court of Fresno County. Alan M. Simpson, Judge.

Gabriel G. Atamian, in pro. Per., for Movant and Appellant.

McCormick, Barstow, Sheappard, Wayte & Carruth, Marshall C. Whitney, Anil Pai, Jerry D. Casheros and Alice M. Dostalova for Defendant and Respondent.

The trial court dismissed a medical malpractice action with prejudice after the plaintiff died and her sons and brother did not follow the procedures that would have allowed the decedent's personal representative or successor in interest to continue the lawsuit.

The brother, representing himself on appeal, claims the trial court erred in dismissing the lawsuit. The defendant doctor contends, among other things, that the brother is not an aggrieved party and therefore lacks standing to pursue this appeal.

We conclude that the record fails to demonstrate that (1) the brother is the decedent's "personal representative" as that term is used in Code of Civil Procedure sections 377.31 and 377.60[1] and the Probate Code or (2) he is the decedent's "successor in interest" for purposes of section 377.31. Thus, the brother has not established that he has standing to appeal.

Accordingly, the appeal will be dismissed.

FACTS AND PROCEEDINGS

This appeal involves a medical malpractice lawsuit brought against William M. Rich, a gynecologist (defendant).

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[1] All further statutory references are to the Code of Civil Procedure unless indicated otherwise.

Gabriel G. Atamian is the sole appellant in this matter. Atamian is the brother of Margaret Beberian, the plaintiff in this case.

Defendant performed a total abdominal hysterectomy on Margaret Beberian in January 2002. About two and a half years later, in November 2004, defendant discovered that Margaret Beberian had cancer on a portion of her uterus that was not removed during the surgery.

In November 2005, Margaret Beberian sued defendant for medical malpractice claiming his negligently performed the hysterectomy and was negligent in failing to diagnose her cancer after the surgery. She also alleged the delay in the diagnosis of the cancer allowed it to spread.

Margaret Beberian, age 76, died in January 2006. At that time, she was not represented by a lawyer in the medical malpractice lawsuit.

On February 15, 2006, Philip Beberian and Atamian filed a document titled "Motion to Amend Complaint for the First Time." The caption of this document listed the following as plaintiffs: "Philip Beberian, Administrator [sic] of the Estate of Margaret Beberian, Deceased; and, Gabriel G. Atamian, MD, MSEE, JD, Brother [sic] and Guardian and Litem of Margaret Beberian, deceased." The motion stated that the proposed

amendment only changed the caption because Margaret Beberian had died in January 2006.

It appears that a hearing was held on February 21, 2006. A reporter's transcript of that hearing is not a part of the record. In April 2006, Philip Beberian filed a request for a continuance that stated: "This matter cam before the Court on February 21, 2006, and at the time, it appeared to the Judge that the 'Motion to Amend Complaint for the First Time' was inappropriately drafted in accordance with the local rules."

On April 28, 2006, Philip Beberian filed another "Motion to Amend Complaint for the First Time," The caption of this motion differed from the prior motion in that it listed only Margaret Beberian as the plaintiff.

On May 2, 2006, a hearing was held. George Beberian attended because his brother Philip was sick. George Beberian stated that they were trying to get the amendment to the complaint granted. The trial court indicated that it would not hear the motion to amend the complaint that day and that, if it were to consider the motion, it appeared that the proposed amended complaint was not an appropriate complaint. Also during the hearing, the trial court and parties discussed granting the moving parties time to try to find a lawyer willing to take the case. After that discussion, the trial court stated that a status conference would be held on July 11, 2006.

On June 209, 2006, a hearing was held on an ex parte application to file an amended complaint. Atamian appeared on behalf of the moving parties. Atamian told the trial court that he had a juris doctorate degree but was not a practicing attorney who had passed the bar. Counsel for defendant opposed the application.

At the end of the June 29, 2006, hearing, the trial court denied the application. A basis for the denial is reflected in the trial court's statement: "There's no reason to have this on calendar for what (Atamian) is trying to do today in an ex parte situation – proceeding."

On July 7, 2006, Philip Beberian and Atamain filed a petition for writ of mandate requesting this court to compel the trial court to grant leave to amend the complaint to add two indispensable parties – namely, himself and Philip Beberian, the administrator of the estate of Margaret Beberian. (Philip Beverian et al v. Fresno County Superior Court (Aug. 3, 2006, F050727).) On July 20, 2006, they also filed a request for a temporary stay of the proceedings in the trial court.

The status conference scheduled for July 11, 2006, was held and only counsel for defendant appeared. The trial court acknowledged that a petition for writ of mandate had been filed with the Fifth Appellate District and stated it was not aware of any stay. Counsel for defendant stated he was not

aware of any stay. At the close of that hearing the trial court stated it would set another status conference in two weeks.

At the July 25, 2006, status conference, only counsel for defendant appeared and the trial court stated it would dismiss the case.

On August 2, 2006, the trial court entered a written order dismissing the action with prejudice. The order stated that (1) a status conference was scheduled for July 11, 2006, and no one appeared on behalf of plaintiff, and (2) another status conference was set for July 25, 2006, and again no one appeared on behalf of plaintiff. The grounds stated for the dismissal was "that plaintiffs have failed to appear at two consecutive Court-ordered conferences. . .have not followed it orders on other occasions in attempting to prosecute this case."

"Remedy of taking steps necessary to file a properly amended complaint in the above reference superior court action." (*Philip Beberian et al. v. Fresno County Superior Court, supra,* F0505727).

On August 10, 2006, a notice of entry of the order of dismissal and judgment in favor of defendant was filed in the superior court. Atamian filed a notice of appeal on September 7, 2006.

On September 6, 2006, Philip Beberian filed a document titled "Declaration of Philip Beberian in

Support of Motion for Order Substituting Successor in Interest for Deceased Plaintiff." Also on that date, Atamian filed an objection to the order of dismissal. The objection stated that (1) the trial court violated sections 472 and 473 by (a) denying the motion to amend the complaint and (b) not pointing out the deficiencies or inadequacies so that the moving parties would have been able to correct and eradicate them, and 92) the trial court acted as an inquisitor, dictating to the moving parties how to proceed and not allowing Atamian to proceed as a self representing litigant. No action was taken on the postjudgment filings.[2]

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[2] Atamian mentioned during oral argument that the superior court did not act on his postjudgment filings. The superior court correctly abstained from addressing these filings. Indeed, if the superior court had tried to enter a ruling on Atamian's postjudgment filings, it would have acted without authority and the ruling would have been void. When Atamian filed his notice of appeal one day after the postjudgment filings, the superior court's jurisdiction over the matter ended, and jurisdiction was vested in this court. (*Betz v. Pankow* (1993) 15 Cal. App. 4th 931, 937-938; see § 916 [effect of perfecting an appeal]). Therefore, regardless of how the filings are characterized (for example, the could be treated as a motion to reconsider under § 1008), the superior court lacked the authority to rule on them. (*Betz v. Pankow, supra,* at p. 938).

Furthermore, the postjudgment filings have not been ignored. This court has considered (1) the declaration of Philip Beberian, along with its two exhibits – a copy of Margaret Beberian's death certificate and a copy of pages one and six of her last will and testament – and (2) Atamian's objection to the order of dismissal.

DISCUSSION

I. Standards Applicable to Self-representing Parties

Atamian's opening brief assets that holdings of the United States Supreme Court establish that self-representing litigants are not required to perform to the same standards as practicing attorneys.

In *Haines v. Kerner* (1972) 404 U.S. 519 (*Haines*), unanimous United States Supreme Court stated that a civil rights action brought under title 42 United States Code section 1983 by an inmate who did not have access to counsel is scrutinized under a less stringent standard than pleadings drafted by lawyers. (*Haines, supra,* at p. 520). The United States Supreme Court has reaffirmed the principles established in *Haines. (Hughes v. Rowe* (1980) 449 U.S. 5, 10, fn. 7).

The principles established in *Haines*, however, do not extend to all self-representing litigants. The United States Supreme Court clarified the scope of the *Haines* decision in a case that did not involve a prisoner by stating: "[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." (*McNeil v. United States* (1993) 508 US. 106, 113 [in ordinary civil litigation, federal procedural rules are not interpreted more leniently for parties who proceed without counsel];

see *Foster v. Williams* (Tex. App. 2002) 74 S.W. 3d 200, 202 [self-representing litigants held to same standards as parties with licensed attorney; liberality in reviewing pleadings is limited to claims by inmates representing themselves].)

In this case, Atamian is not a prisoner and the malpractice claim against defendant is not a civil rights action under title 42 United States Code section 1983. Thus, the less stringent pleading standard described in *Haines* does not apply in this case. Instead, the pleadings and motions filed by Atamian *in the trial court* are subject to the standards general applied by California in civil litigation. (*Gamet v. Blanchard* (2001) 91 Cal. App. 4th 1276, 1284-1285 [self-representing litigants are not exempt from statutes or court rules governing procedure; nonetheless, courts should exercise special care when dealing with self-representing litigants to make sure verbal instructions and written notices are clear and understandable to lay persons]).

Furthermore, with respect to the rules of procedure applied *in this court*, we conclude that a self-representing litigant is treated like any other party and, therefore, is subject to the same rules of appellate procedural as parties represented by an attorney. (*Nwosu v. Uba* (2004) 122 Cal. App. 4th 1229, 1246-1247 [appellant representing elf on appeal must follow correct rules of procedure]).

II. Standing to Appeal

A. Contentions of the Parties

Defendant argues that Atamian does not have standing to appeal the underlying judgment of dismissal because he is not aggrieved by that judgment. Defendant acknowledges that when a plaintiff to a pending action dies, the action may go forward upon a proper motion by the deceased plaintiff's personal representative or successor in interest. (§§ 377.31 [decedent's personal representative or successor in interest may pursue actions not abated by original plaintiff's death], 377.60 [persons with standing to pursue a wrongful death action]). Defendant contends that Atamian (1) did not follow proper procedures and (2) is neither the personal representative nor the successor in interest of Margaret Beberian.

The opening brief filed by Atamian asserts that he was the personal representative of Margaret Beberian and that Philip Beberian was her successor in interest.

B. Standing Requirements.

Standing on appeal is governed by section 902, which provides that "[a]ny party aggrieved may appeal in the cases prescribed in this title."[3]

In this case, the parties appear in agreement that the judgment would aggrieve the personal representative of Margaret Beberian or her successor in interest.

1. Successor in interest

Atamain is the sole appellant and he contends that Philip Beberian is Margaret Beberian's successor in interest. (See § 377.11 [definition of successor in interest].) Atamian does not contend that he is a successor in interest of Margaret Beberian for purposes of standing in this lawsuit.

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[3] The Code Commissioners' notes that accompany section 902 include the statement that "[o]ne not a party to the record may appeal, if aggrieved by the judgment." (Code commrs. Notes, 18 West's Ann. Code Civ. Proc. 91980 e.) foll. § 902, pp. 10-11).

In addition, Atamian is not a member of the State Bar of California and is not appearing in this appeal as an attorney representing Philip Beberian. Philip Beberian has not appealed the judgment.[4]

Based on these facts, we conclude that Atamian is not Margaret Beberian's "successor in interest" for purposes of section 377.31. As a result, Atamian's standing to pursue this appeal must be based on some other ground.

In summary, if the trial court committed any error by not allowing Philip Beberian to proceed with his mother's lawsuit, only Philip Beberian had standing to pursue that error. Atamian may not assert that error on behalf of Philip Beberian because Atamian is representing only himself in this appeal.

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[4] The notice of appeal filed on September 7, 2006, contained both the names and signatures of Atamian and Philip Beberian, but a line was drawn by hand thhough three of the four places where Philip Beberian's name was typed on the form and also through his handwritten signature. The appellant's opening brief and appellant's reply brief filed in this court refer only to Atamian as an appellant.

2. **Personal representative**

Atamian contends that he "was the personal representative of the decedent, when the decedent filed the original complaint on November 10, 2003. [¶] In essence, where the 90% of the original complaint which was medical terminology was drafted by Gabriel G. Atamian with the collaboration of the decedent when she was alive." Based on these contentions, Atamian concludes that the trial court violated sections 377.31 and 377.60 by not permitting him to continue the lawsuit against defendant.

The Law Revision Commission comment to section 377.31 indicates that Probate Code section 58 contains that applicable definition of the "personal representative." (Cal. Law Revision Com. com., 14 West's Code Civ. Proc. (2004 ed) foll § 377.31, p. 135.).[5]

Probate Code section 58, subdivision (a) defines "personal representative" to mean "executor, administrator, administrator with the will annexed, special administrator, successor personal representative, public administrator acting pursuant to [Probate Code] Section 7660, or a person who performs substantially the same function under the

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[5] The comment also states that the personal representative or successor in interest has an absolute right to be substituted for the decedent. (Cal. Law Revision Com. com, 14 West's Code Civ. Proc, supra, foll § 377.31, p 135).

law of another jurisdiction governing the person's status." Thus, the term "personal representative" is used in section 377.31 in a technical, legal sense.

The role of "personal representative" is described in part by Probate Code section 8400, which states: "(a) A person has no power to administer the estate until the person is appointed personal representative and the appointment becomes effective. Appointment of a personal representative becomes effective when the person appointed is issued letters."

In this case, Atamian did not allege that he was appointed as the personal representative with the power to administer the estate of Margaret Beberian. Furthermore, he did not present any documents that demonstrate he was appointed as the personal representative of her estate. In particular, the appellate record does not show Atamian was issued letters by the probate court.

It appears that Atamians' claim that he is a personal representative of Margaret Beberian is based on a broader, informal definition of the term "representative". We conclude the use of such a definition from the Probate Code must be used.

In summary, Atamian has failed to demonstrate that he is a "personal representative" entitled to pursue the malpractice lawsuit against defendant under either section 377.31 or 377.60.

III. Recusal

During oral argument, Atamian requested a justice to recuse himself from the case on the ground that the justice was a former partner in the law firm representing defendant.

Whether a judge should hear a case in which his or her former law firm is representing one of the parties is a common issue. (See Rothman, *Cal. Judicial Conduct Handbook* (1999) § 7:41, pp. 198-199). The question has arisen often enough that the Legislature has determined that, after a certain amount of time has passed, judges may hear a case in which their former law firm is appearing. Specifically, section 170.1, subdivision (a)((2)(B) states that a judge is disqualified for a two-year period from hearing a case where a "lawyer in the proceeding was associated in the private practice of law with the judge."

Atamian's opening appellate brief observes that the justice was a partner in the law firm until 1992. Therefore, the two-year period expired over a decade ago. As a result, no grounds for disqualification of the justice exist in this matter.

IV. Other Arguments Raised on Appeal

Atamian's failure to establish his standing requires this court to dismiss his appeal.

Accordingly, the remaining arguments that he has raised on appeal cannot be reached by this court.

V. Judicial Notice

Defendant's "Request to Take Judicial Notice" filed on July 25, 2007, is granted. To the extent that earlier requests for judicial notice have not been ruled upon, those requests are denied.

DISPOSITION

The appeal is dismissed. Defendant shall recover his costs on appeal.

/s/ Dawson J.
Dawson, J.

WE CONCUR:

/s/ Gomes, Acting P.J.
GOMES, Acting P.J.

/s/Kane, J.
Kane, J.

Jerry D. Casheros, #203897
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Attorneys for Defendant
WILLIAM M. RICH, M.D.

SUPERIOR COURT OF THE STATE OF
CALIFORNIA COUNTY OF FRESNO

MARGARET BEBERIAN, Plaintiff, v. WILLIAM M. RICH, MD., Defendant.	Case No. 05CECG03527 **NOTICE OF ENTRY OF ORDER, WITH PREJUDICE, AND ENTRY OF JUDGMENT IN FAVOR OF WILLIAM RICH, M.D.**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 2, 2006, the Honorable Alan M. Simpson signed the Order of Dismissal, With Prejudice, and Entry of Judgment in Favor of William rich, M.D. A copy of said Order is attached herewith as Exhibit "A" and incorporated herein.

Dated: August 8, 2006

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP

By: /s/ Jerry D. Casheros
Jerry D. Casheros
Attorneys for Defendant
WILLIAM M. RICH, M.D.

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Attorneys for Defendant
WILLIAM M. RICH, M.D.

SUPERIOR COURT OF THE STATE OF
CALIFORNIA COUNTY OF FRESNO

MARGARET BEBERIAN, Plaintiff, v. WILLIAM M. RICH, MD., Defendant.	Case No. 05CECG03527 **ORDER OF DISMISSAL WITH PREJUDICE, AND ENTRY OF JUDGMENT IN FAVOR WILLIAM RICH, M.D.**

On July 11, 2006, a Status Conference in this case was scheduled before the Honorable Judge Alan Simpson in Department 72 of the Fresno County Superior Court. Attorney Jerry D. Casheros

appeared on behalf of Dr. Rich. No appearance was made on behalf of plaintiffs. The Court desired an explanation from plaintiffs as to why they had failed to appear at a scheduled Conference, and, accordingly, set another Status Conference for July 25, 2006 in Dept. 72 of the Fresno County Superior Court. During that Conference, Mr Casheros appeared on behalf of Dr. Rich, but, again, no one appeared on behalf of the plaintiffs.

The Court recognized that plaintiffs have failed to appear at two consecutive Court ordered conferences. The Court further recognized that plaintiffs have not followed it orders on other occasions in attempting to prosecute this case.

In consideration of the above, the Court orders that the instant litigation against defendant, William Rich, M.D., be dismissed, with prejudice. The Court also orders that judgment in this matter be granted in favor of defendant RICH. Plaintiffs shall take nothing by way of their Complaint in this matter, and defendant RICH is entitled to recover appropriate costs of suit and any other relief authorized by law.

Dated: August 2, 2006

/s/ Alan M. Simpson
Judge of the Superior Court

Philip Beberian, Administrator
Of the Estate of Margaret Beberian,
Deceased; and, Gabriel G. Atamian,
MD, MSEE, JD, Brother of Margaret Beberian
Deceased,
1387 W – Sierra Avenue
Fresno, California 93711
(559) 440-1064
In Pro Per

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

Case No. 05CECG03527

Margaret Beberian,)
) **DECLARATION OF PHILIP**
Plaintiff.) **IN SUPPORT OF MOTION**
) **FOR SUBSTITUTING**
William M. Rich, M.D.) **SUCCESSION IN EREST**
) **FOR DECEASED**
Defendant.) **PLAINTIFF**
) Dept. 72
) Judge: Alan Simpson

I, Philip Beberian, declare:

1. This action was commended on November 10, 2006.

2. On January 16, 2006, plaintiff Margaret Beberian died. The Death Certificate is attached hereto as Exhibit "A".

3. A copy of the final order showing this distribution is attached hereto as Exhibit "B".

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

9/6/2006

/s/ Philip Beberian
Philip Beberian

BEST AVAILABLE COPY

CERTIFICATION OF VITAL RECORD

COUNTY of FRESNO

DEPARTMENT OF COMMUNITY HEALTH
FRESNO, CALIFORNIA

CERTIFICATE OF DEATH 3200610 000150

Margaret	-	Beberian				
			07/13/1929	76		F
CA	129-30-0996		Widowed	01/16/2006	0900	
Some College ☐ no		☒	Armenian			
Owner / Operator		Beauty Shop			20	
1387 W. Sierra Ave.						
Fresno	Fresno	93711	20	CA		
Philip Beberian - son		1387 W. Sierra Ave., Fresno, CA 93711				
-	-	-				
Gregory	-	Armenian		TX		
Mary	Unknown	Unknown		TX		
01/18/2006	Ararat Manis Cemetery - 250 N. Hughes, Fresno, California					
Burial	▸ Not Embalmed					
Wildrose Chapel & Funeral Home	FD 1499 ▸					
Saint Agnes Medical Center	☐ no ☐ ☐ ☐ ☐ ☐					
Fresno	1303 E. Herndon Ave.	Fresno				
→ Respiratory Failure				Weeks	☐ no	
Bilateral Pneumonia				Weeks	☐ no	
Bilateral Atelectasis				Weeks	☐ no	
Bilateral Malignant Pleural Effusion				Weeks	☐ no	
Recurrent & Metastatic Stage IV Squamous Cell Cancer of Vulva Vaginal Canal.						
Debridement of Necrotic Tissue of Perineal Vulva & Vaginal Canal 09/30/2003, 09/30/2005, 10/01/2003					☐ no	
				A35758	01/18/2006	
12/01/2004	01/13/2006	Rendell Concepcion, M.D. - 7202 N. Millbrook, Fresno, CA 93720				

*00066643

CERTIFIED COPY OF VITAL RECORDS
STATE OF CALIFORNIA, COUNTY OF FRESNO

This is a true and exact reproduction of the document officially registered and placed on file in the Vital Records Section, Fresno Co. Department of Community Health

DATE ISSUED FEB 0 1 2006

COUNTY HEALTH OFFICER
REGISTRAR OF VITAL STATISTICS

This copy not valid unless prepared on engraved border containing date, seal and signature of Registrar

Exhibit "A"

A-1

LAST WILL AND TESTAMENT OF MARGARET BEBERIAN

I, MARGARET BEBERIAN, a resident of the County of Fresno, State of California, being of lawful age, and of sound and disposing mind and memory, and not acting under duress, menace, fraud, or undue influence, hereby make, publish and declare this to be my Last Will and Testament, and expressly revoke all Wills and Testaments including codicils, which I have previously made.

ARTICLE I: BOUNTIES OF AFFECTION

Bounties of Affection: I am not married. The bounties of my affection are as follows, namely:

Explanation and reassurance as to the benign nature of this lesion(s). No treatment is necessary or recommended at this time.

(A) My son, **PHILIP BEBERIAN,** born July 23, 1961;

(B) My daughter, **LILLIAN M. BEBERIAN,** born March 29, 1967;

(C) My son, **GEORGE BEBERIAN,** born August 5, 1965, as to a discretionary gift only.

My son, **GREGORY BEBERIAN**, who has sufficient wealth of his own, receives no part or portion of my estate.

The terms "child," "children," and "issue" as used herein include the above named children and any child or children hereafter born to or legally adopted by me, however this does not include any child or other person otherwise omitted under Section 9.2 herein.

Section 9.5. Gender and Numbers: As used in this Will, the masculine, feminine or neuter gender, and the singular or plural numbers shall each be deemed to include the others wherever and whenever the context so indicates.

IN WITNESS WHEREOF my Last Will and Testament consisting of six (6) pages, inclusive of this page, is subscribed by me on this 16th day of September 2005, at City of Fresno, County of Fresno, State of California, in the presence of Daniel P. Jehadian and Vanessa Poeschel, attesting witnesses, who subscribe their names hereto at my request and in my presence.

/s/ Margaret Beberian
Margaret Beberian

Philip Beberian, Administrator
Of the Estate of Margaret Beberian,
Deceased; and, Gabriel G. Atamian,
MD, MSEE, JD, Brother of Margaret Beberian
Deceased,
1387 W – Sierra Avenue
Fresno, California 93711
(559) 440-1064
In Pro Per

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

Case No. 05CECG03527

Margaret Beberian,	)
	) **OBJECTION TO THE**
Plaintiff.	) **ORDER OF DISMISSAL,**
	) **WITH PREJUDICE,**
William M. Rich, M.D.	) **ENTRY OF JUDGMENT**
	) **IN FAVOR OF WILLIAM**
Defendant.	) **RICH, M.D.**
	) Dept. 72
	) Judge: Alan Simpson

Petitioner Gabriel G. Atamian, MD, MSEE, JD do herby certify and object to the order of dismissal, with prejudice, and entry of judgment in favor of William Rich, MD; and in support of his objection, states:

1. Petitioner received the order on or about August 10, 2006.

2. The order is premature for the following reasons:

a. **The Complaint was filed on November 10, 2005, meaning 10 months ago. Judge Simpson and Mr. Casheros, counsel of defendant, Dr. Rich, have managed quite nicely, until today not to answer the pleading. Thus, in the present case, because no answer was filed by defendant, Dr. Rich, the pleading state is incomplete. Meaning, that a case cannot be dismissed unless pass the pleading stage.**

b. **The lower court violated CCP 472 and 473, by denying the motion for amended complaint, and, also, by not pointing out the deficiencies of inadequacies, in order the petitioners would have been able to correct and eradicate them?**

c. **The lower court has acted as an inquisitor, dictating the petitioners to how to proceed, and not allowing the petitioner Gabriel G. Atamian, MD, MSEE, JD, to proceed as a pro se litigant?**

3. On February 221, 2006, the defendant withdrew the demurrer. Petitioner does not

understand how Judge Simpson has signed an Order of Dismissal without a demurrer and without the answer or response of the defendant.

WHEREFORE, for the above reasons the order of the dismissal should be set aside by the court.

Respectfully submitted,

/s/ Gabriel G. Atamian, MD, MSEE, JD
Gabriel G. Atamian, MD, MSEE, JD

September 6, 2006

CERTIFICATE OF SERVICE

I, George Beberian, do hereby certify that a copy of objection to the Order of Dismissal, with prejudice, was served on 9/6/2006, first class mail, postage prepaid, on:

Jerry Casheros, Esq.
P.O. Box 28912
5 River Park Place East
Fresno, CA 93720-1501

/s/ George Beberian
George Beberian
1387 W. Sierra Avenue
Fresno, CA 93711
559-435-1621

9/6/2006

Court of Appeal, Fifth District – No. F051240
S161450

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARGARET BEBERIAN, Plaintiff,

v.

WILLIAM RICH, Respondent;

GABRIEL G. ATAMIAN, Moveant and Appellant

The petition for review is denied.

George, C.J., was absent and did not participate.

Supreme Court filed
April 23, 2008

/s/Frederick K. Ohlrich
Deputy

/s/ Werdegar
Acting Chief Justice

Gabriel G. Atamian, MD, MSEE, JD
Brother of deceased Margaret Beberian
1021 N. State Street Apt A
Dover, DE 19901
302-678-2546

UNITED STATES OF DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Gabriel G. Atamian, MD, MSEE, JD,	Civil Docket No. _____
Plaintiff,	1: 07cv-00027
Alan Simpson, individually And his official capacity of The Judge of Fresno County: Superior Court; William M. Rich, MD; and Jerry D. Casheros, counselor of Dr. Rich;	The Honorable Judge Anthony W. Is_____ (not readable)
Defendants.	

AFFIDAVIT OF GABRIEL G. ATAMIAN, BA, BS, MA, MD, MSEE, MS, JD

This is the Affidavit of Gabriel G. Atamian, MD, MSEE, JD.

Gabriel G. Atamian possesses the following degrees:

BA	(cum laude)	1960
MA	in chemistry	1961
MD		1965
BS	computer sciences	1986
MSEE	in electrical engineering	1989
MS	in applied physics	1990
JD	juris doctor	1993

Gabriel G. Atamian, is one of the best educated physician that America has produced, he has:

PM&A board certification	1976
Diploma in Psychiatry with Honors	1979
Educational training for three years	
At the American College of Cardiology	1982-1984

Attached hereto as Appendix II, is the complete curriculum Vitae of Gabriel G. Atamian.

Affiant does possess a Master in Chemistry from Columbia University, which renders him to be a qualified as an expert for the immunochemistry of this case; where, the immunoprofile, it will be very evident that defendant has left a portion of the uterus behind during the hysterectomy.

A. Defendant has left a portion of the uterus during hysterectomy on 1/17/2002.

1. Plaintiff Margaret Beberian had two cancers, in this unique case:

   a. the adenoma carcinoma of uterus, where, defendant has left a portion of the uterus during the hysterectomy. (See Count I, Complaint), the immunoprofile is:

   CK 7 +/ CK 20 -/ mucin -

   b. the paget's invasion of the urethra, where the immunochemistry is:

   CK 7 +/ CK 20 +/ mucin +

Defendant, Dr. Rich, has concealed the existence of the two cancers, with different origins.

2. Pathology report of the vaginal biopsy on 11/19/04 (S04-19156), (A-9)* reveals:

CK 7 +/ CK 20 -/ mucin –

(*) (A-9) denotes and refers to Appendix I, Exhibit Pertaining to the Affidavit.

The report states:

> "This immunoprofile may be seen with endometrium, breast as well non-mucinous ovarian tumors and lung. In view of the patient's history of status-post hysterectomy, the vagina tumor could represent metastasis from the breast primary. Review of slides from the breast carcinoma may be helpful in elucidating this matter."

3. The literature search indicates that the Mammary paget's disease are all associated with the mucin expression.

Citing some medical pertinent literature as reference:

i. Mod Pathol. 2005 Oct.: 18(10); 1295-304. (A-11 and A-12), states:
Expression of mucin (MUC1, MUC2. . . MUC6) and their prognostic significance in human breast cancer.

ii. Am J. Surg Pathol 2001 Dec; 25(12): 1469-77, (A-13 and A-14), reveals:

> "Paget's disease (PD) of the skin is characterized by intraepidermal adenocarcinoma cells,

> which contain clear cytoplasm and abundant mucin. Nearly all cases of mammary PD (MPD), are associated with underlying ductal carcinoma of the breast. . ."

Note: - The pathology report the vulvar paget's disease on (A-6) indicates that the morphologic and immunophenotypic findings are consistent with a primary skin based paget's disease.

In conclusion, the paget's disease of the vulva and the paget's disease of the breast contains mucin as indicated by the above evidence. Therefore, the vaginal biopsy on 11/19/04, which is a non-mucin indicates the existence of two types of cancer,

a. CK 7 +/ CK 20 -/ mucin -, which is the adenocarcinoma of the uterine origin;

b. CK 7 +/ CK 20 +/ mucin + which is the paget's disease which does contain mucin.

4. Metastasis of pleural fluid collected on 1/7/06, reveals (A-10):

Microscopic examination: Mucicarmine stain is negative.

Comment: The tumor cells are histologically similar to the poorly differentiated carcinoma in the prior vaginal biopsy (SO-19156), 11/19/04.

In summary, the metastatic cancer in the pleural cavity is the same tumor as the vaginal biopsy on 11/19/04. The only conclusion that can be drawn is that mucin negative marker indicates that it is not paget's disease of the breast or the vulva; it is, therefore, the uterine adenocarcinoma, due to the fact that defendant, Dr. Rich, did not and has not taken the entire total uterus out.

B. **Defendant, Dr. rich, failed to adhere to accepted standards of medical practice.**

The following are set forth that Dr. Rich deviated from the standard of care of medical practice:

a. Defendant has left a portion of the uterus in the vagina during the hysterectomy on 1/17/2002. Where, because of the tamoxifen therapy, that portion has become cancerous. Citing the medical literature tamoxifen causes uterine cancer:

i. Gyn Oncol 2004 Oct; 95(1): 139-44(A-15);

ii. Ann Oncol 2000 March; 11(3): 355-8, (A-16);

iii. Arch Gynecol Obst 2000 Apr; 263(4): 170-7, (A-17);

iv. Obstet Gynecol 1993 Aug; 82(2): 165-9, (A-19);

All the above citation describe that tamoxifen does associate with endometrial cancer. It is supported by data.

Also, citing An Atlas of Pelvic Operations, 2d ed, 1968, by Saunders, states;

p. 7, (A-19): "Helpful Hints for Hysterectomy:

> 16. . . but some portion of the cervix may be left behind on the lateral fornix if insufficient attention is paid to these corners.

p. 30, (A-20 and A-21): Figures 53 and 54 and Figures 55 and 56.

The greatest danger arises when you blindly attempt to apply a clamp to control bleeding vessels when you cannot identify them.

Dr. Rich, in his operative report on 1/17/2002, writes: "hemostasis was thought to be good. . It was decided not to perform a

lymphadenectomy due to the lack of adequate exposure". (See A-1)

On 11/19/2004, the portion of the uterus which was left behind was discovered; where, the pathology reports indicates to be a uterine adenocarcinoma The only way to explain is that the defendant has not given enough attention to the lateral fornix during the surgery. Even, defendant confesses that he did not have adequate exposure and the hemostasis was "thought to be good".

b. Due to delayed diagnosis of the vaginal cancer by the defendant, the cancer was spread to bilateral inguinal nodes. Bilateral inguinal spread reveals that this type of cancer is not timely detected. Moreover, it renders the prognosis to be very poor. (See Complaint, Count II).

c. Defendant has failed to perform the following:

i. Paraaortic lymph node Evaluation.

Citing, Novak's Gynecology, 13 ed., states on p. 1213, (A-22):

"Any enlarged paraaortic lymph nodes are dissected,.

> . . , and specimens are sent for analysis by frozen sections. If lymph nodes are positive for metastatic cancer, an option is to discontinue the operation and use radiation therapy."
>
> Citing TeLinde's Operative Gynecology, 8th Ed.:
>
> "On p. 1437, (A-23),. . .In most clinics, early invasive adenocarcinoma of the cervix is managed as stage IB."
>
> "on p. 1442, (A-24),. . .In most clinics through the United States, most patients with stage IB and Stage IIA cervical cancer are offered extensive abdominal hysterectomy and bilateral pelvic lymphadenopathy as primary treatment."

The above medical literature advocate the need of lymphadenectomy in order to find out whether radiation treatment is necessary.

Defendant in his surgical operative notes on 1/17/2002, (A-1), state that he has skipped this important and valuable procedure of

lymphadenectomy; which, it would have permitted deceased to have radiation therapy on 2002 rather than on 2005.

Deceased started radiation treatment on 2005, where the cancer was already spread to both inguinal nodes. The inguinal nodes metastasis do have a very poor prognosis in this specific tumor.

Moreover, deceased received radiation treatment on 2005, where the tumor size was already gotten very big, 2.0 x 2.5 cm; another, poor prognostic sign which should be blamed on the defendant for skipping a procedure such as lymphadenotectomy.

ii. Defendant has negligently failed to conduct adequate physical examination of the vagina on more office visits, in order to detect the uterine cancer timely.

It is very peculiar that a mass of 2.0 x 2.5 cm to appear suddenly in 5 weeks prior, unless defendant has not conducted adequate physical examination of the vagina on more office visits. (See Complaint, Count III).

On 10/8/04, defendants progress notes (A-26), reveals that there has been no changes of the pelvic examination since 7/15/04.

On 11/19/04, defendant's progress notes (A-26), suddenly, reveals a new finding of a 2.0 x 2.5 cm mass in the vaginal introitus.

It is very peculiar that a mass of 2 x 2.5 cm to appear suddenly on the span of 5 weeks, unless defendant has not conducted adequate physical examinations on prior visits.

Note: Moreover, that on 7/15/04, defendant's progress notes reveals that defendant has obscuring view of the vagina. (A-26).

iii. Citing TeLinde's Operative Gynecology, 8th ed., states:

"on page. 1435, (A-25):

> Diagnosis: Because stage IA lesions in women without symptoms usually are detected by vaginal cytology, differential diagnosis is best made by experienced colposcopist in conjunction with a colposocopically directed biopsy. If the question of microinvasion is raised from the colposcopic findings, from the biopsy, or from the curettage of the endocervical canal, a

> conization of the cervix is mandatory to rule out the presence of frank or deeply invasive cancer."

Defendant has failed to do a colposcopy.

Defendant has failed to do during the colposcopy a curettage of the endometrial findings.

Above all, the defendant has failed to do a conization of the cervix which is very mandatory for the institution of the treatment.

Where the conization was done by the defendant, the deceased would have received adjuvant radiation therapy on 2002 rather than on 2005, almost three years past.

WHEREOF, plaintiff prays the Court to order the defendant to respond to the Affidavit of Gabriel G. Atamian, BA, BS, MA, MD, MSEE, MS, JD.

Respectfully submitted,

/s/ Gabriel G. Atamian, MD, MSEE, JD
Gabriel G. Atamian, MD, MSEE, JD

February 9, 2007

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(2)

No. 08-11

Supreme Court, U.S.
FILED
AUG - 1 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GABRIEL G. ATAMIAN, MD, MSEE, JD,

Petitioner,

v.

WILLIAM M. RICH, MD,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of Calfornia, Fifth Appellate District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Whether the Court has jurisdiction to exercise appellate review of a state court decision which does not implicate any question of Federal law, treaty or statute of the United States?

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II. COUNTERSTATEMENT OF JURISDICTION

As detailed *infra,* William M. Rich, M.D. (hereinafter "Respondent") bases his Opposition on, among other things, this Court's lack of jurisdiction over the issues presented by Gabriel G. Atamian (hereinafter "Petitioner"). Contrary to Petitioner's argument, 28 U.S.C. §1257(a) is wholly inapplicable in this context, nor are there any alternative basis for this Court to grant Petitioner's Writ.

III. COUNTERSTATEMENT OF CASE

Petitioner advances this Petition for Writ of Certiorari without jurisdictional basis. Before approaching this Court, Petitioner filed a multitude of appeals and motions with every inferior court that could conceivably exercise jurisdiction over Respondent. Simply put, this is the only remaining court from which Petitioner's claims have not been summarily dismissed.

Origins of the Petition at Issue

Petitioner seeks reversal of the denial of his Petition for Review to the California Supreme Court, which effectively upheld the dismissal of his appeal by the California Fifth District Court of Appeals. The judgment of dismissal originated in the Fresno County Superior Court, case number 05CECG03527, entitled *Margaret Berberian v. William M. Rich, M.D.* In essence, Petitioner asks this Court to undo the uniformity of decisions in favor of Respondent,

spanning nearly three years of litigation. This litigation involves a straightforward dismissal in a California medical malpracti e action. It concerns no determination of any United States Court of Appeals, questions of federal law, or matter of constitutional law.

Specifically, the background allegations commence in January 2002, when Margaret Berberian ("Ms. Berberian") underwent a hysterectomy performed by Respondent, an obstetrician/gynecologist. In November of 2005, Ms. Berberian (*in propria persona*) sued Respondent for alleged medical malpractice, essentially claiming that Respondent had failed to timely diagnose uterine cancer. Ms. Berberian's complaint was plagued with defects.

In January 2006, Ms. Berberian passed away. (Petitioner's Appendix (hereinafter "P. App.") 23.) On February 15, 2006, Philip Berberian, the decedent's nephew, and Petitioner, Ms. Berberian's brother, thereafter filed an "motion to amend complaint for the first time" seeking to add only their names to the caption and leaving the substance of the complaint untouched – including statements to the effect that Ms. Berberian was still alive. (Respondent's Appendix (hereinafter "Resp. App.") 1, Exhibit "A.") Over the next several months, Petitioner was advised to properly amend this Complaint. The Superior Court afforded him substantial time to do so. The trial judge also continued multiple hearings and provided Petitioner ample time to try and secure counsel to assist him in this matter.

Despite these efforts, Petitioner refused to correct the deficiencies in the pleadings, failed to appear at two ordered conferences, and would not take appropriate steps to prosecute the case. Nearly a year after its filing, the negligence complaint was dismissed with prejudice. (P. App. 19-20.)

Petitioner appealed the dismissal to the Fifth District Court of Appeal for the State of California. Petitioner's appeal was dismissed for lack of standing – he was not the real party in interest to the trial court action. (P. App. 15-16.) Petitioner then sought a Petition for Review to the Supreme Court of California. That petition was denied. (Resp. App. 3, Exhibit "B.") Having encountered no success through state court processes, Petitioner has now shifted his focus toward this Writ of Certiorari.

IV. SUMMARY OF ARGUMENT

Petitioner asserts that the Court has jurisdiction to hear this matter. Yet, the Petition is devoid of any federal question, relationship to any decision or determination of any federal court, or any other appropriate basis for a Petition for Writ of Certiorari. All of Petitioner's substantive arguments – which involve application of California state law – have been made previously and were dismissed as substantively meritless by the California courts. Petitioner's argument is nothing more than an attempt to re-litigate claims properly disposed of under a state

law analysis. Therefore, the present Petition should be denied.

V. ARGUMENT

A. This Court Lacks Jurisdiction Over the Judgment at Issue

1. Petitioner Erroneously Asserts That 28 U.S.C. §1257 Grants This Court Jurisdiction

28 U.S.C. §1257 is wholly inapplicable to the present Petition. Section 1257, in pertinent part, expressly limits the Supreme Court's jurisdiction to matters where: "the *validity of a treaty or statute of the United States* is drawn in question or where the *validity of a statute of any state* is drawn in question on the ground of its being *repugnant to the Constitution*, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." (28 U.S.C. §1257(a) (emphasis added).)

"Drawn in question" means that the issue must either be raised or "squarely considered and resolved" by the state court, or actually decided by the appropriate Court, or both. (*Illinois v. Gates*, 462 U.S. 213, 218 n.1, 103 S.Ct. 2317, 76 L. Ed. 2d 527 (1983).) Further, "specially set up or claimed" requires not only that the issue be brought up but that it be brought up

expressly and at the right time. (*Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308, 23 S.Ct. 375, 47 L. Ed. 480 (1903) "[T]he right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.") Indeed, in cases where the petitioner failed to raise the argument of a potential federal issue in the state court, the matter was deemed waived for purposes of certiorari review. (*Webb v. Webb*, 451 U.S. 493, 495, 101 S.Ct. 1889, 68 L. Ed. 2d 392 (1981).)

Here, the present Petition implicates no rights arising from federal law or involving a federal question. Moreover, because Petitioner did not raise any federal question or issue of constitutional law in the state courts, these arguments and contentions are deemed waived and cannot be raised for the first time on Petition. Finally, any argument that a constitutional issue (as to the substantive state law applied in the lower courts) was "impliedly" raised or otherwise was set at issue in the state court proceedings is also ill fated because a state's statute is not sufficiently "drawn into question" if not explicitly and timely challenged by the petitioner. (*Charleston Fed. Sav. & Loan Ass'n v. Alderson*, 324 U.S. 182, 185, 65 S.Ct. 624, 89 L. Ed. 857 (1945).)

Therefore, the Court has no jurisdiction to hear the present Petition as the writ is not authorized under 28 U.S.C. §1257. The Petition at issue should be denied.

2. The Underlying Matter Was Decided Based Exclusively on California Law

It is well settled that where the Petition arises from a state court judgment, which itself is based on a ground other than a law raising a federal question, the United States Supreme Court will not take jurisdiction. The foregoing rule applies even if the position of the state court is an unsound one. (*De Saussure v. Gaillard*, 127 U.S. 216, 234, 32 L. Ed. 125, 8 S.Ct. 1053 (1888); *Walter A. Wood Mowing & Reaping Machine Co. v. Skinner*, 139 U.S. 293, 295, 11 S.Ct. 528, 35 L. Ed. 193 (1891), cited in dissenting opinion in *Michigan v. Long,* 463 U.S. 1032, 1067, 103 S.Ct. 3469, 77 L. Ed. 2d 1201 (1983).)

Petitioner bases this Petition simply on his dissatisfaction with the rulings handed down against him in the California courts due to: (1) His lack of standing to sue; (2) Failure to comply with court orders; and (3) Failure to properly prosecute the underlying litigation. All of the foregoing determinations of the California courts were made independent of any Federal question. As such, no grounds for the Court's exercise of jurisdiction exist.[1]

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[1] Even if Petitioner could somehow demonstrate that the California courts incorrectly applied California law (which, we submit, he cannot), the Court should still deny review as the foregoing is not a substitute for a lack of jurisdiction.

B. The Court Should Decline to Exercise Discretionary Review

1. Even if the Court Has Jurisdiction Over the Underlying Matter, It Should Refuse Certiorari Review

Certiorari review under Section 1257 of title 28 is *discretionary*. (28 U.S.C. §1257, (emphasis added).) Supreme Court Rule 10 provides some illustrations of where said discretionary review should be exercised and contains the admonition that certiorari review will be granted only for "compelling reasons." Specifically, Rule 10 sets forth three categories of issues which may present a "compelling reason" for granting discretionary review: (a) To deal with a *decision rendered by one United States Court of Appeals* that is in conflict with another United States Court of Appeal on an important matter; (b) When a state court of last resort has decided an *important federal question* that conflicts with the decision of another state court of last resort or United Status Court of Appeals; (c) Where a state court or a United States Court of Appeals decided an *important issue of federal law* that has not been and should be settled by the Supreme Court, or that conflicts with the prior holdings of the same. (Supreme Court, Rule 10 (emphasis added).)

The key theme tying together each of these three categories is a petition's relationship to a federal law or an act of a federal judiciary. In contrast, all of Petitioner's arguments are based on California law. Specifically, he complains that he is a "fiduciary"

under the California Probate Code and characterizes that as a key "question of law, wrongly decided."

The present petition is thus devoid of any relationship to a decision of any federal court, determination or application of any federal law, or in any way connected to a dispute between any two state's courts of last resort. The present Petition, along with the appeals which preceded it, is without merit and constitutes an unfortunate waste of judicial and party resources. For these reasons as well, the Petition must be denied.

C. The California Courts Correctly Decided All Issues Before Them

The analysis below is offered based on the procedural history of the underlying action, beginning with judgment entered against Ms. Berberian in the Fresno County Superior Court (the trial court), that served as the catalyst for this Petition. The analysis concludes with the denial of Petitioner's petition for review to the Supreme Court of California.

1. The Dismissal of Petitioner's Claims at the Trial Court Level Was Appropriate

As noted, *supra*, this action stems from a Complaint based on the alleged malpractice of the Respondent (the "Underlying Action"), originally filed by the deceased, Ms. Berberian, in November of 2005. At the time of her death, Ms. Berberian was unrepresented by counsel, was the only named plaintiff in the

Underlying Action, and a personal representative or successor in interest had not been substituted into the case. On February 16, 2006, Phillip Berberian ("Phillip") (the decedent's son) and Petitioner (the decedent's brother) filed a "motion to amend for the first time"; the only proposed substantive change being the substitution of Phillip and Petitioner as Plaintiffs in the caption of the Complaint.[2] (Resp. App. 1, Exhibit "A.")

At a May 2, 2006 hearing on the matter, the trial judge, the Honorable Judge Alan A. Simpson advised Phillip and Petitioner of the substantive and procedural deficiencies of the proposed amendment and advised them to seek counsel. Petitioner thereafter failed to rectify the deficiencies in the pleadings or obtain counsel to assist him. In the interests of justice and to ensure the matter was resolved on the merits, the trial court granted Phillip and Petitioner (to which Respondent consented), two sixty-day extensions to allow them to address its various concerns.

In response to these extensions, Phillip represented to the trial court, on the record, that if he failed to secure counsel within said sixty days, that he and Petitioner would voluntarily dismiss the action. (Resp. App. 3, Exhibit "B.") Petitioner failed to obtain counsel within that time frame, did not properly amend

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[2] The amended complaint included references to Ms. Berberian still being alive, as well as numerous other deficiencies and errors.

the pleadings, but nonetheless clung on to this litigation. To make matters worse, Petitioner failed to appear at two consecutive court-ordered Status Conferences.[3] Due to Petitioner's failure to comply with the rules of civil procedure and the California Rules of Court in properly prosecuting his claims, Ms. Berberian's complaint was dismissed with prejudice on August 2, 2006 – nearly one year after the initial filing of the action.[4] (P. App. 19-20.)

2. Because Petitioner Lacked Standing, the Dismissal of His Appeal Was Appropriate

After the action was dismissed by the trial court, Petitioner filed his appeal in the Fifth District Court of Appeal on September 7, 2006. Petitioner again failed to comply with the Rules of Court, specifically California Rule of Court 8.220(a)(1), by failing to file an Opening Brief and Appendix. Yet again, Petitioner received an admonishment from the California appellate court on February 22, 2007, this time being

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[3] Status Conferences are set in the Fresno County Superior Court system to issue trial dates and generally discuss the status of cases.

[4] Petitioner advances several allegations of judicial misconduct and "aberrations" which purportedly involve the presiding judge, the Honorable Alan A. Simpson, and Respondent's counsel, Jerry Casheros. These contentions find no support in the record. While the foregoing is not dispositive as to the present Petition, Supreme Court Rule 15 commands Respondent to identify perceived misstatements of fact or law.

advised that if he did not file the required papers within 15 days of said notice, his appeal would be dismissed. (Resp. App. 8, Exhibit "C.") Petitioner eventually filed his Opening Brief and Appendix on June 25, 2007.

Ultimately, the Fifth District Court of Appeal rejected Petitioner's appeal based on a proper determination of standing under California law. In California, only an aggrieved party may appeal a case. (Cal. Code of Civ. Proc. §902.) A party is aggrieved only if his or her rights or interests are injuriously affected by the judgment. (*County of Alameda v. Carleson*, 5 Cal. 3d 730, 737, 488 P.2d 953 (1971).) Generally, only a party of record may appeal the lower court's judgment. (*Id.*) Where the appellants are not named as parties to the action, nor did they take any appropriate steps to become parties to the record, it is proper to dismiss the appeal. (*Eggert v. Pacific States Sav. & Loan Co.*, 20 Cal. 2d 199, 201, 124 P.2d 815 (1942).) In contexts such as these where the plaintiff is no longer able to prosecute her claims, the decedent's personal representative or the decedent's successor in interest may continue in their stead. (Cal. Code of Civ. Proc. §377.31.) However, a person has no power as a personal representative until he or she is appointed. (Cal. Probate Code §8400(a).) A person is eligible for appointment as a personal representative if the person is named as executor in the decedent's will, or, if the decedent dies intestate, the Court appoints them as a personal representative. (Cal. Probate Code §§8420, 8460.)

The Court of Appeal determined that Petitioner was not the personal representative of Ms. Berberian, as he was never appointed as such. (P. App. 14.) Nor was Petitioner ever properly joined before the lower court action as a party. (P. App. 11.) Accordingly, Petitioner was not an "aggrieved party," as defined under California law. This negated his standing to bring an appeal. Based on this lack of standing, the remainder of Petitioner's arguments were moot.[5]

As detailed above in sections (a) and (b), Petitioner enjoyed significant accommodation in each step of the underlying action. Nonetheless, Petitioner failed to cure the defects in his pleadings, would not follow court orders, and, finally, declined to attend two court-mandated hearings. The warranted dismissals at the trial court and Court of Appeal levels were based solely on the application and construction of California law and did not expressly or impliedly involve any federal question.

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[5] However, even had the Court of Appeal found Petitioner to have standing, the trial court's substantive bases for the dismissal would have supplied more than sufficient basis for affirmance on appeal.

VI. CONCLUSION

The decision Petitioner asks this Court to review is based exclusively on California law, and without the involvement of any federal court or issue of federal law. The underlying action was correctly and fairly decided and should not be disturbed. Based on the foregoing, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

KURT F. VOTE*
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Attorneys for Respondent William M. Rich, MD

**Counsel of Record*

RESPONDENT'S APPENDIX EXHIBIT A

Philip Beberian, Administrator
of the Estate of Margaret Beberian,
Deceased; and, Gabriel G. Atamian,
MD,MSEE,JD, Brother of Margaret Beberian
Deceased
1387 W. Sierra Avenue
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In Pro Per

**IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO**

Margaret Beberian, Plaintiff William M. Rich, MD, Defendant.	**MOTION TO AMEND COMPLAINT FOR THE FIRST TIME.** (Filed Apr. 28, 2006) Compklaint [sic] Filed: November 10, 2005 Trial Date: Unassigned Date: May 2, 2006 Time: 3:30 pm Dept: 72 Judge: Honorable Alan Simpson

Comes Now Plaintiffs, by themselves, and moves this Honorable Court, to amend for the First Time the Complaint, and in support of their motion state:

1. Plaintiffs respectfully request permission to file their first amended complaint in the form attached to this motion as Exhibit A.

2. The amendment consist only by changing the caption by adding two plaintiffs and deleting plaintiff's margaret because she was deceased on January 16, 2006.

3. Needless to say, that with the above change, the action will be a wrongfull [sic] death.

4. Permitting Plaintiffs to amend their Complaint would be fair and in no way prejudicial to defendant.

WHEREFORE, Plaintiffs pray that the motion be Granted.

Respectfully submitted,

Dated: 4/28/06

/s/ Philip Beberian
Philip Beberian,
Plaintiff Pro se

RESPONDENT'S APPENDIX EXHIBIT B

Case No. 05 CE CG 03527 No.

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

CENTRAL DIVISION

Before the Honorable Alan Simpson, Judge

Department 72

MARGARET BEBERIAN, Plaintiff/Appellant, vs. WILLIAM RICH, M.D., Defendant/Respondent.	) REPORTER'S TRANSCRIPT ON APPEAL (Filed Jan. 3, 2007) VOLUME I PAGES 1-50 MAY 2, 2006 JUNE 29, 2006 JULY 11, 2006

–oOo–

APPEARANCES:

FOR THE PLAINTIFF AND APPELLANT: GABRIEL G. ATAMIAN, MD, MSEE, JD
1387 West Sierra Avenue
Fresno, California 93711

FOR THE DEFENDANT AND RESPONDENT: McCORMICK, BARSTOW, SHEPPARD WAYTE & CARRUTH LLP
BY: JERRY D. CASHEROS
5 River Park Place East
Fresno, California 93720

* * *

Reported by:
SUZANNE M. McKENNON, CSR, RPR, CRR
Certificate No. 9713

[12] trying to explain this to you. I've tried to explain it about two or three different ways, kind of all around the same concept. I think you're understanding that. But this isn't working. And so all I'm going to do today is continue this for a short – fairly short time.

You see, by doing that, their – their client has a right also to have a resolution to this. Whether – whether he did something right or wrong or provided treatment that was below the standard of care or not, he – he has a right to have this moved along, too, and not just proceed at your pace. And so I've got to consider that, too.

And so you said time. How much time do you – do you need, do you think?

MR. BERBERIAN: Can you give us 60 days?

THE COURT: Well, can you tell me –

MR. BERBERIAN: Yes.

THE COURT: I don't want to know what any attorneys have told you or your brother. Can you tell me what you think is going to happen in 60 days or what the plan is that's going to happen over the next 60 days that's going to be different than the last 60 days?

MR. BERBERIAN: Well, you want me to tell you now?

THE COURT: Yes.

MR. BERBERIAN: We found some attorneys that were waiting for the records, and I had to subpoena all the records from the subpoena service.

[13] THE COURT: Okay. Did you get the records?

MR. BERBERIAN: I got the records.

THE COURT: Did you get the records to the attorney?

MR. BERBERIAN: No, no. They just came to me today.

THE COURT: Okay.

MR. BERBERIAN: The box is bigger than – it's this much of records (indicating).

THE COURT: A foot and a half high?

MR. BERBERIAN: More.

THE COURT: I understand how that can be.

MR. BERBERIAN: Anyway, they just came. Now, they want the records, and they're going to look through everything. And then they're going to make their thing. But if we can't do this, we'll gladly just dismiss the case after the 60 days. We'll just drop the

whole thing. And I can put that on my – on my – on my word right now. We'll let it go. If we can't find a lawyer in 60 days, we're going to let this – we're going to dismiss it ourselves.

THE COURT: I see. All right.

Did you wish to be heard further, Mr. Casheros?

MR. CASHEROS: No.

THE COURT: Is there a date that would be convenient for both of you in approximately 60 days or so?

MR. CASHEROS: Whatever works for the Court and Mr. Berberian is fine.

THE COURT: Well, how about – how about Tuesday,

* * *

[40] STATE OF CALIFORNIA)
) ss.
COUNTY OF FRESNO)

I, SUZANNE M. McKENNON, Certified Shorthand Reporter, do hereby certify that the foregoing pages, numbered 1 to 40, inclusive, comprise a full, true and correct transcript of my shorthand notes, and a full, true and correct statement of the proceedings held at the time and place heretofore stated.

DATED: Fresno, California
January 3, 2007

/s/ Suzanne M. McKennon
SUZANNE M. McKENNON,
CSR, RPR, CRR
CERTIFICATE NO. 9713

* * *

RESPONDENT'S APPENDIX EXHIBIT C

STATE OF CALIFORNIA
Court of Appeal
FIFTH APPELLATE DISTRICT

2525 CAPITOL STREET
FRESNO, CALIFORNIA 93721-2227

[SEAL]

LEISA V. BIGGERS
CLERK/ADMINISTRATOR

JULIE N. BAGOYE
ASSISTANT CLERK/
ADMINISTRATOR

TELEPHONE (559) 445-5491
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February 22, 2007

Gabriel G. Atamian
1387 W. Sierra Ave.
Fresno, CA 93711

Re: Atamian v. Rich
F051240
Fresno County No. 05CECG03527

Dear Counsel:

You are hereby notified that if appellant's appendix and opening brief are not on file or good cause for relief shown within 15 days after the date of this notice, the appeal herein will be dismissed. (Rule 8.220(a)(1), California Rules of Court.)

Very truly yours,

/s/ Leisa V. Biggers
LEISA V. BIGGERS
Clerk/Administrator

cc: All counsel